

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Implementation of Section 255 of the)
Telecommunications Act of 1996)
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
By Persons with Disabilities)

WT Docket No. 96-198

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COMMENTS OF OMNIPOINT CORPORATION

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Omnipoint Corporation ("Omnipoint"), by its attorneys, files these comments in response to the Notice of Inquiry, FCC 96-382 (rel. Sept. 19, 1996) ("NOI") in the above-captioned proceeding.¹ In its recommendations to the Architectural and Transportation Barriers Compliance Board ("Access Board") and its enforcement of Section 255 of the Communications Act, the Commission should seek reasonable obligations on manufacturers and providers of telecommunications service to provide that telecommunications are usable and accessible for individuals with disabilities.

INTRODUCTION AND SUMMARY

Omnipoint strongly supports the statutory goals to build on and improve the efforts in the telecommunications industry to provide disabled Americans with full access to and use of

¹ Omnipoint Corporation develops and manufactures equipment for wireless communications, including equipment using the Omnipoint IS-661 air interface standard. In addition, Omnipoint, through its subsidiaries, is the Block A broadband PCS licensee for the New York MTA and holds 18 Block C broadband PCS licenses throughout the country. Thus, as both a manufacturer and a service provider, Omnipoint is directly impacted by the recommendations and policies promulgated in this proceeding.

telecommunications. Omnipoint agrees with Chairman Hundt's statement that the objective in this proceeding is to provide "an important first step in fulfilling our congressional mandate to ensure that persons with disabilities enjoy the full benefits of the telecommunications revolution." The emergence of competitive market forces in telecommunications, including a host of new wireless service providers, will undoubtedly encourage the development of many new services for consumers with a variety of telecommunications needs. Indeed, the Commission has often noted that competition brings not only lower prices for existing services but also new entrants with niche offerings and service alternatives for smaller segments of the consumer market that were simply not adequately served in a monopoly environment. Ultimately, Omnipoint believes that the burgeoning competitive market will provide the disabled with full access to and use of telecommunications; the measures taken in this proceeding and in enforcement of Section 255 should reasonably encourage industry to that goal.

Because the mandate for "accessible" and "usable" telecommunications equipment and telecommunications services is limited by statute to that which is "reasonably achievable," the Commission and Access Board have wisely sought public input. Omnipoint believes that *effective implementation* of Section 255 requires the Commission and the Access Board to set realistic and definitive policy principles. First, classes of disabilities must be defined because it is neither readily achievable nor technically possible at this time to accommodate all disabilities, or combinations of disabilities, at once; implementation efforts are most effectively directed at defined disability challenges that can be readily solved. Second, the Access Board and the Commission should focus on ensuring that equipment and services for the disabled are produced by the manufacturing industry for all major classes of disabilities; individual entities should not be responsible for producing equipment or offer services to meet the needs of all the disabled. Third, consistent with the definition of "readily accessible" and with the Commission's own policies encouraging small businesses, the Access Board and the Commission should forebear from specific design or development obligations on small business manufacturers or service

providers. Finally, the process of ensuring compliance should be sensitive to the time it takes to develop, test and introduce products in the marketplace; industry should be provided with ample time to bring its activities into compliance after standards are made publicly available and revised, when appropriate.

DISCUSSION

I. "Readily Achievable" Standard Provides That Section 255 Obligations Must Be Reasonable

Central to this proceeding is to define what is "readily achievable." Each of the three broad Section 255 obligations -- manufacturing, service provider, and compatibility -- are conditioned on being "readily achievable" for the manufacturer or service provider. As the Commission notes at ¶ 15 of the NOI, "readily achievable" is defined in the Americans with Disabilities Act ("ADA") (42 U.S.C. § 121881(9)) as "easily accomplishable and able to be carried out without much difficulty or expense." In addition, the ADA sets out the following four-prong test for evaluating if a specific measure is "readily achievable:" (A) the overall cost of the measure; (B) the financial resources of the particular facility obligated to take the measure, including such factors as the number of employees at the facility, the effect that the proposed measure would have on its expenses, financial resources, and the overall operations; (C) the overall financial resources of the entity; and (D) the relationship of the particular facility in question to the larger covered entity.

Thus, the statutory language itself requires action by telecommunications manufacturers and service providers only when it can be easily accomplished, can be carried out without significant costs or difficulty, and only when the particular effects of the action have been measured against its impact on the individual facility, and the organization that owns the facility. In the context of telecommunications manufacturers and service providers, several implications follow from the statutory language. First, it is apparent that Congress' emphasis on measures that can be easily accomplished and its focus on the business impact of the measure means that manufacturers and service providers should in no cases be forced to accept design concepts or

network changes that significantly impinge on their business and technical planning. Rather, the "readily achievable" standard is, on its face, meant to not disrupt the marketplace for CPE or services, or to cause businesses to suffer economic hardship or failure. A regulatory position that is less sensitive to this market-based standard would be itself contrary to the statute. While the Commission correctly notes the mandate for the disabled to fully participate in telecommunications, a regulatory regime that attempts to force manufacturers or service providers to adopt measures at significant cost, or that attempts to constrain the design or product efforts of individual manufacturers, is likely to result only in drawn-out litigation without any benefit for the disabled. Second, because the statutory standard requires an individualized determination (based on the impact of compliance both on the particular facility affected and the parent company) and a fact determination of what is "difficult or expensive" in the context of that entity's resources, the Commission must engage in a case-by-case determination as it enforces Section 255.² See Part II (D), below, and NOI at ¶¶ 7, 29-34.³ Third, the statutory language "expense or *difficulty*" (emphasis added) contemplates that more than just an operator's or manufacturer's out-of-pocket expenses should be taken into consideration. Rather, the *technical*

² For example, the statute is reasonably interpreted to mean that the relatively small and modest resources of a division of a larger company should be taken into account.

³ While the statute requires a case-by-case enforcement approach, Omnipoint believes that it is critical from a policy perspective for the Commission to set early and continuing policy guidance on Section 255 and to work closely with the Access Board so that industry can be well-apprised of the Commission's view on what are generally appropriate compliance measures. General principles should also reduce the number of complaints filed and the complexity of the enforcement process.

difficulty to deploy a particular equipment or service feature into an existing or planned network, regardless of the cost of the equipment or feature, is an equally relevant factor under the statute.⁴

In addition, as the Commission and the Access Board interpret "reasonably achievable" as applied to telecommunications manufacturers and service providers, they should be aware of how the Department of Justice ("DOJ") and the federal courts have interpreted the term. DOJ, which was given primary responsibility to enforce and promulgate rules under the ADA, has promulgated regulations to further define "readily achievable" in the context of public accommodations.⁵ See 28 C.F.R. § 36.304(a)-(g). In its preamble explaining these regulations, DOJ makes it clear that the "reasonably achievable" standard is intended to "stri[k]e a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses" Department of Justice, Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and In Commercial Facilities (published July 26, 1991), *found at* 1996 Code of Federal Regulations, Appendix B, Title 28, Part 36, at 626 ("DOJ Preamble"). While DOJ promulgated a list of specific and non-exclusive examples as to how businesses could comply with the "reasonably achievable" standards, it notes that businesses need not meet those examples if not "readily achievable," e.g., rearrangement of chairs or tables in a restaurant is not necessary "to the extent that they would result in a significant loss of selling or serving space." DOJ Preamble at 627.

⁴ In the context of PCS, the Commission and the Access Board should take into account the fact that there are several different and incompatible interface standards in PCS and solutions that emerge for one technology are not necessarily feasible for all others. For example, equipment or technical solutions that work with CDMA-based systems may not apply to GSM-based systems, and so GSM operators should not be judged against CDMA operators, and vice-versa.

⁵ The ADA requires owners of existing commercial public accommodations (e.g. restaurants, theaters, etc.) to remove architectural barriers so that persons with disabilities may have access, to the extent "reasonably achievable." 42 U.S.C. § 12182(b)(2)(A)(iv) & (v).

Moreover, DOJ explains that the "reasonably achievable" is a lower standard than an "undue burden" standard: "measures that are not easily accomplishable and are not able to be carried out without much difficulty or expense are not required under the reasonably achievable standard, even if they do not impose an undue burden or an undue hardship." *Id.* Further, DOJ's interpretation of "reasonably achievable" does not require the affected business to demonstrate that compliance will negatively impact on profits, it must only show that compliance "could not be done without 'much difficulty or expense.'" *Id.*

Similarly, courts have also recognized that the ADA "reasonably achievable" standard demands that careful consideration be given to the burdens of compliance on the affected businesses. *See, e.g., First Bank National Ass'n v. FDIC*, 79 F.3d 362, 371 (3rd Cir. 1996) (reasonably achievable standard implies temporal element -- "what is easy to accomplish in one year may not be easy to accomplish in one day"); *Slaby v. Berkshire*, 928 F. Supp. 613, 618 (D. Md. 1996) (readily achievable standard balances business' ability to pay with the needs of the disabled so that "modifications need only be 'able to be carried out without much difficulty or expense.'"); *Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574, 588 (S.D. Ca. 1993) ("By adopting the 'readily achievable' standard, Congress ensured that a business's obligation to remove barriers would reflect its ability to do so. As the Government states, barrier removal which would in fact have a dramatic deleterious effect on IHOP's business would not be required under the 'readily achievable' standard.").

The Commission and the Access Board should take the DOJ and judicial interpretations of "reasonably achievable" into consideration as they determine what compliance and enforcement measures should apply to telecommunications manufacturers and service providers.

II. Effective Implementation of Section 255 Requires that the Commission and the Access Board Set Realistic Goals

Omnipoint believes that in attaining the statutory goals for access and use of telecommunications for the disabled, the best could be the enemy of the good. In other words,

efforts to force strict and unworkable regulatory requirements and deadlines, or radical restructuring and enormous expense, are not likely to prevail given the statutory limit of "reasonably achievable" implementation. Therefore, the challenge in this proceeding is to initiate realistic changes to the way the current telecommunications industry meets the equipment and service needs of the disabled. As noted above, Omnipoint believes that, as competitors enter the telecommunications market, niche players and large telecommunications providers looking for new areas of business growth will address the disabled as a viable new customer base. In order to expedite the coming of that market solution, Omnipoint recommends that the Commission and the Access Board keep their efforts centered on the following key implementation principles:

A. Classes of Disabilities to be Addressed Must Be Further Defined

The ADA very broadly defines "disability" to include, for example, any "physical or mental impairment that substantially limits one or more of the life activities." 42 U.S.C. § 12102(a)(2). As the Commission notes at ¶ 13 of the NQI, however, the Senate intended for Section 255 to address telecommunications access and use issues faced by "individuals with functional limitations of hearing, vision, movement, manipulation, speech, and interpretation of information."⁶ Omnipoint believes that, at least in the near term, the latter classes of disabilities should receive the primary focus of the Commission, the Access Board, and the industry. In this way, the compliance requirements and enforcement efforts can focus on several identifiable disabilities that impair a significant number of Americans. Moreover, the focus on identifiable classes of disabilities will permit the Commission, the Access Board, and the industry to more

⁶ The Senate Report clarifies that while the ADA definition of "disability" applies to Section 255, "[t]he Committee intends the definition of disability to principally cover individuals with functional limitations of hearing, vision, movement, manipulation, speech, or interpretation of information." S. Rep. No. 104-23, 104th Cong. 1st Sess., at 52 (1995) ("Senate Report").

readily measure their progress toward technological and market solutions. We note that industry has already made significant progress toward accommodating persons with some of these identified disabilities. Examples of equipment and services that aid these disabled are: TTY/TDD; flashing ringers; the Internet; relay services; call process indicators; telephone amplifiers; telephones with large size keys; telebraille machines; facsimile machines with voice and hearing carry-over; TTY-compatible answering machines and voicemail; and speed dialers. Finally, an identifiable list of disabilities will also provide manufacturers and service providers with clarity as to their obligations. See also 42 .C.F.R. § 36.304(c) (DOJ rules establish priorities for implementation of public accommodation standards); and DOJ Preamble at 628 ("The purpose of these priorities is to facilitate long-term business planning and to maximize, in light of the limited resources, the degree of effective access that will result from a given level of expenditure.").

Omnipoint's proposal is not for the purpose of excluding other disabilities from telecommunications. Indeed, Omnipoint recommends that a manufacturer's or service provider's efforts at addressing such other disabilities should certainly be taken into account in any enforcement action. Setting a definable list of targeted disabilities, however, permits both industry and the Commission to evaluate the efficacy of its activities over the course of time.

B. Compliance Objectives Should be Measured Across the Industry, With No Single Manufacturer or Service Provider Responsible For Addressing All Disability Needs

Omnipoint believes that the underlying statutory objective is to provide greater access and availability to persons with disabilities, even as telecommunications technologies evolve. It is not necessary to accomplish this goal by requiring all manufacturers or all service providers to expend resources in an effort to meet a plethora of disability needs. In fact, requiring such extensive compliance from manufacturers and providers will likely frustrate the ability of market players to offer an array of different competitive services for the disabled. It would also impede

the entry of competitive telecommunications providers, in contravention of the overarching policy objective of the 1996 Act.⁷

Omnipoint believes that manufacturers and service providers can meet their obligations under Section 255 by addressing some, but not all, of the needs of the disabled in their business and network planning. In this regard, Omnipoint agrees with the Commission that "Section 255 only reaches those aspects of accessibility to telecommunications that equipment manufacturers and service providers . . . have direct control over." NOI at ¶ 21. Consistent with this principle, manufacturers and service providers should be deemed to comply with the statutory mandate if they make efforts at addressing the needs of the major classes of the disabled. In no case should a single business be required to bear the burden of addressing the telecommunications needs for all disabilities, or for combinations of disabilities. Rather, different equipment or services can accomodate different classes of customers with disabilities, but no one device or service can accomodate all classes of disabilities.

Instead, the Access Board should review at regular intervals the progress of how the equipment market, as a whole, is meeting the needs of persons with disabilities. In the same way, the Access Board should review at regular intervals how service providers in a given region or market, as a group, are providing accessibility for disabled persons. If the Access Board finds that availability is lacking in one or more specific areas, the Access Board could publish this finding and seek to work with industry to resolve the shortfall.

Similarly, the Commission should clarify that regulated entities may rely on the features and functionalities of the incumbent LECs as they implement Section 255. For example, manufacturers or service providers should be able to design and implement equipment or services for the disabled that are compatible with the incumbent LEC's unbundled or resold

⁷ Further, the "readily achievable" standard, as explained above, would also likely preclude such daunting regulatory approach.

services. See 47 U.S.C. § 251(c)(3)&(4) (incumbent LECs have duty to unbundle network elements and offer retail services at wholesale rates). In this way, competing local providers would be less apt to needlessly expend resources on network functionality already offered by the incumbent LEC, and more manufacturers and service providers will be able to make meaningful improvements for the disabled.

C. Small Business Service Providers and Manufacturers Should Be Exempt From Section 255 Enforcement

As the Commission has often noted, telecommunications has historically been a difficult market for small business entry. The Commission and Congress have set the promotion of small business entry in telecommunications as a key goal for both spectrum-based services and the telecommunications industry generally. 47 U.S.C. §§ 309(j)(4), 257; Fifth Report and Order, PP Dkt. No. 93-252, 9 FCC Rcd. 5532 (1994) (subsequent history omitted). One critical regulatory element for promoting small business market entry is to reduce the regulatory burdens that would otherwise consume small business resources, management time, and business planning flexibility.

In order to encourage the development of small businesses in telecommunications, Omnipoint submits that the Commission should forbear from enforcing Section 255 requirements against small business manufacturers and service providers, pursuant to the Commission's forbearance powers in Section 10 of the Communications Act, 47 U.S.C. § 160(a). Because the encouragement of small businesses serves the underlying policy goal of increasing competition in telecommunications, forbearance would be consistent with the Section 10 objectives of "enhanc[ing] competition among providers of telecommunications services." 47 U.S.C. § 160(b). Moreover, forbearance would not be inconsistent with Section 255, which measures "readily achievable" based on the regulated entity's overall financial size. 42 U.S.C.

§ 12181(9) (B) & (C). Small businesses are, by definition, a class of entities that are unlikely to be subject to exacting compliance under such a standard.⁸ By exempting small businesses from the outset, the Commission can relieve these businesses and their management of regulatory uncertainty, allowing them to focus their resources on competing with telecommunications giants.

D. The Process for Implementation Should Be Predictable and Should Provide Regulated Entities With Ample Time for Business Planning, Standards Development, and Product Design/Development

Omnipoint believes that there should be a five-step process for implementation of Section 255. Throughout this process, special emphasis should be given to make findings, recommendations, and decisions as public as possible, so that regulated entities are able to plan and design to conform to Section 255 as early on in the business planning stages as possible. Cost savings for industry can be realized if the Section 255 guidelines and standards are incorporated early into the product design phase. Design corrections late in the development cycle, by contrast, are exponentially more costly. Further, in order that one segment of industry does not use the Section 255 implementation process to their parochial favor, the Access Board and the Commission should strive to make Section 255 implementation technology - neutral and manage the burden of compliance across all industry segments.

First, the Commission should lay down in this proceeding a set of clear policy guidelines for the Access Board and for its own enforcement purposes. Omnipoint believes these policies

⁸ Omnipoint believes that some, though not all, small businesses may choose to focus their business efforts at establishing a niche service base specifically designed to meet the telecommunications needs of the disabled. It seems readily apparent, however, that the statute did not mean for all small businesses to be obligated to divert their scant resources to designs for the disabled when that is not their business plan, and would potentially jeopardize their ability to compete against large, established telecom companies with exponentially greater resources.

should include: Section 255 standards must be "readily achievable," as discussed above; goals are to be met by the industry, so that no single entry is responsible for meeting all disability needs; small business should be encouraged to find market solutions for the disabled, but should be exempt from enforcement actions; businesses need ample time to plan and build-in design solutions to their equipment or services. The Commission may wish to seek further public comment on a proposed set of principles in order that all interested parties have sufficient input and awareness of policy developments. Omnipoint does not believe that the Commission should adopt regulations implementing Section 255 standards. NOI at ¶ 33. While the Commission has exclusive enforcement jurisdiction, Section 255(e) clearly contemplates that the Access Board shall set the guidelines for compliance. Specific substantive Commission rules would seemingly supplant the Access Board's statutory role. For these same reasons, Omnipoint objects to the proposal for licensed service-specific rules. Id. at ¶ 34. On this issue, it is significant that while the Senate version of Section 255 required the Commission to promulgate regulations after the issuance of the Access Board standards,⁹ the Conference Committee dropped that rulemaking function of the Commission in the final bill.¹⁰

Second, the Access Board should conduct a thorough review of the telecommunications needs of the disabled, the existing services and equipment on the market that serve those needs, and then publish guidelines, in consultation with applicable industry standards bodies and consistent with the Commission's policy objectives, on how the industries can better meet the

⁹ See Senate Report at 109 (Senate Bill, adding Section 262 to the Communications Act, required Access Board standards within one year (§ 262(e)) and Commission regulations after 18 months (§ 262(g)).

¹⁰ See Conf. Rpt. 104-458, 104th Cong., 2nd Sess. at 135 (1996).

needs of the disabled.¹¹ The process for development of guidelines will serve to reinforce the implementation issues to affected parties and provide them with more concrete concepts that can be worked into design of equipment and deployment of new services.

Third, standards bodies (e.g., EIA/TIA, Bellcore) should be given a reasonable amount of time to develop standards per the Access Board guidelines. Omnipoint believes that the standards bodies will require approximately 12 to 18 months.

Fourth, after industry has had a reasonable opportunity to "readily achieve" the Access Board Recommendations, the Commission may enforce Section 255 on the basis of complaints that are filed. Evaluation of an entity's compliance with the "readily achievable" standard will necessarily involve an individualized determination, as the statute calls for an examination of whether compliance was appropriate given the entity's financial resources and business plan.¹² Therefore, Omnipoint supports a case-by-case Commission enforcement approach. See NOI at ¶ 7. In addition, compliance requirements should be applied in a *prospective* manner only after the Access Board has promulgated guidelines and industry has had a reasonable opportunity to incorporate those guidelines into technical standards and product design/development. Not only is prospective application consistent with the legislative history of Section 255,¹³ it also comports with the "readily achievable" standard.

¹¹ The Senate Report (at 53) notes that "the Committee expects that manufacturers of equipment and providers of service will be fully included in this process."

¹² The legislative history of the ADA discussing the "readily achievable" standard makes it clear that compliance is to be evaluated on a case-by-case basis. See, H. Rep. No. 101-485(III), 101st Cong., at 55 (1990) ("readily achievable" definition "provides factors to be considered in making a determination of what is readily achievable in a particular case") & 61 ("readily achievable analysis must be done on a case by case basis").

¹³ The Senate intended for the manufacturer obligation "to apply prospectively to such new equipment manufactured after the date for promulgation of regulations by the Commission," and for the service provider obligation "to apply prospectively to such new services provided after

(Footnote continued to next page)

Fifth, the Access Board should convene a re-examination of its recommendations every five years in order to update its compliance recommendations based on technological advances, as well as to consider disabilities not previously addressed under the pre-existing guidelines. In this way, the Section 255 goals will keep abreast with technology changes and the Commission's regular enforcement actions will encourage industry to update its services and products to the disabled. Limiting this update of the recommendations to a five-year frequency also allows industry to plan with a fair degree of certainty that the products introduced today (which may have been designed one year ago) are not immediately antiquated and unmarketable.

CONCLUSION

Omnipoint encourages the Commission and the Access Board to ensure that the disabled have greater access to and availability of telecommunications. The most effective way to achieve


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the date for promulgation of regulations by the Commission." Senate Report at 53. While the requirement for Commission regulations contained in Section 308 of the Senate Bill (adding 47 U.S.C. § 262(g) was dropped in conference, the Congressional intent remains for prospective-only application of Section 255 obligations, after industry has had a reasonable opportunity to plan for those obligations.

those goals is to guide the inventive abilities of telecommunications firms to find economically sound ways to serve the disabled.

Respectfully submitted,

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